

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WINTERTHUR MUSEUM, INC.,)	
)	
Appellant/Employer,)	
)	C.A. No. 05A-09-002 MMJ
v.)	
)	
FRANK MOWBRAY,)	
)	
Appellee/Employee.)	

Submitted: February 15, 2006

Decided: May 12, 2006

Upon Appeal from a Decision of The Industrial Accident Board
AFFIRMED

MEMORANDUM OPINION

Timothy A. Casey, Esquire, Kerri L. Morris, Esquire, Marshall, Dennehey,
Warner, Coleman & Goggin, Wilmington, Delaware, Attorneys for Appellant

Joseph J. Rhoades, Esquire, A. Dale Bowers, Esquire, Wilmington, Delaware,
Attorneys for Appellee

JOHNSTON, J.

Winterthur Museum, Inc. (“Employer”) has appealed the Industrial Accident Board (“Board”)’s August 15, 2005 decision granting Frank Mowbray (“Claimant”)’s Petition to Determine Compensation Due concerning a work injury that occurred on August 2, 2004. Claimant and Employer presented evidence at a hearing conducted before the Board on June 28, 2005 (“Hearing”). Claimant specifically sought a finding of compensability, total disability benefits, or, in the alternative, partial disability benefits, ongoing from August 2, 2004, and medical expenses. The Board concluded that Claimant had sustained injuries to his left upper extremity while working for Employer on August 2, 2004, and has been disabled from all work due to those injuries ongoing from that date. The Board awarded Claimant medical expenses in the amount of \$10,383.99, his medical witness fee and attorneys’ fees.

Employer asserts that the Board’s decision is not supported by substantial evidence and is an error of law, and should be reversed. Claimant contends that the Board’s decision granting Claimant’s petition is free of legal error and supported by substantial evidence, therefore, the order granting the Petition to Determine Compensation Due must be affirmed.

FACTS AND PROCEDURAL CONTEXT

Claimant was employed as a seasonal assembly line worker for Employer, assembling cardboard boxes for shipping and packing for about five or six days before the work accident. For eight hours each day, he worked at a workstation where he stuffed envelopes, assembled boxes, filled orders, tied ribbons around various sized boxes, and prepared boxes for shipment. Claimant also was responsible for packing merchandise into boxes and stuffing stacks of envelopes for mailing. Claimant estimated that he packed approximately two to three hundred boxes of all sizes in one day. Claimant previously worked as a longshoreman and a delivery driver. These activities never involved packaging and assembling.

On August 2, 2004, at approximately 11:30 a.m., Claimant was lifting a box onto a conveyer belt when he developed a sudden onset of pain in his left hand and arm. Claimant described the pain as “excruciating.” Claimant then met his girlfriend on his lunch break, who gave him Tylenol or Advil for his pain. Claimant returned to work late and explained to his supervisor that he was having a lot of pain in his left hand and arm, and that he was going to the hospital.

At the hospital, Claimant reported that he had experienced tingling in his left arm for two days before the accident. Claimant never had problems with his left arm or hand in the past. Jeremy Nye, the order fulfillment supervisor for Employer, testified that he was aware that the onset of Claimant's symptoms of tingling in his arm began on Saturday, two days before Claimant's injury. Nye also testified that Claimant did not indicate that his symptoms were related to his work activities. Further, another employee testified that he overheard Claimant talking to other employees about numbness in his left hand which began on Saturday, and that Claimant was concerned that he would no longer be able to fill boxes the same way as he always did. The other employee immediately reported this information to Diane Marks, the Human Resources Manager for Employer's catalog operations center. Claimant testified that at the time of his injury, he did not know what type of injury he had, but he knew that he needed immediate medical treatment.

Dr. Peter Bandera, the only medical expert to provide testimony, testified on behalf of Claimant. Dr. Bandera opined that Claimant developed left carpal tunnel syndrome and overuse syndrome with tendonitis of the forearm. An EMG was consistent with Dr. Bandera's diagnosis of left carpal tunnel

syndrome. In the expert's opinion, Claimant's work activities with Employer were the cause of his injuries and symptoms. Claimant was placed on temporary total disability status as of August 2, 2004. On cross-examination, Dr. Bandera explained that one of the general causes of carpal tunnel is a stressful use of the area, i.e., using the arm or wrist in certain positions. He also explained that Claimant's description of a sudden "excruciating pain" as he was lifting a box could be attributed to his tendonitis features, which is trauma to the muscle itself, rather than to his carpal tunnel symptoms. He opined that Claimant's packing activities during his employment with Winterthur were enough to trigger a process of carpal tunnel syndrome.

FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE BOARD

The following were some of the findings and conclusions of the Board in its August 15, 2005 decision:

- On a Petition to Determine Compensation Due, Claimant has the burden of proof, and must demonstrate, by a preponderance of the evidence, that but for his work activities, he would not have sustained a low upper extremity injury.¹ The work accident need not be the sole cause or even

¹*See Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

a substantial cause of the injury. If the accident provides the “setting” or “trigger,” causation is satisfied for purposes of compensability.² In the alternative, Claimant carries the burden of establishing, by a preponderance of the evidence, that the cumulative detrimental effect of his work activities for a week at Winterthur caused the left upper extremity injuries.³ To merit total disability benefits, a Claimant must show that he was actually, totally incapacitated from earning wages.⁴

- Claimant has met his burden to support the finding that the work activities on August 2, 2004, caused injuries to his left upper extremity. Claimant was disabled from all work since August 2, 2004.
- The un rebutted opinion of Dr. Bandera is reliable as to causation of Claimant’s left carpal tunnel syndrome and overuse syndrome with tendonitis of the forearm. Dr. Bandera opined that Claimant’s description of lifting a box and feeling pain radiating up his left arm to his neck was consistent with the findings of tendonitis, and that the packing activities

²*Id.*

³*Page v. Hercules*, 637 A.2d 29, 33 (Del. 1994).

⁴*M. A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967).

that Claimant performed for one day at Winterthur were enough to trigger a process of carpal tunnel syndrome.

- Dr. Bandera's findings were later confirmed by an EMG in September 2004, and he ultimately referred Claimant to Dr. Townsend for a surgical opinion in October 2004.
- The Board found Claimant credible as to the work-related nature of his injuries. Claimant had worked for a total of 43 hours at Winterthur performing repetitive packing activities during the week of his employment from July 26 through July 30. Claimant testified that he experienced no upper extremity symptoms before the date of his employment with Winterthur, and there was no prior medical evidence reflecting otherwise.
- Even if the onset of Claimant's symptoms initially occurred at home over the weekend, the nature of his work activities for over forty hours at Winterthur the previous week supports the inference of a causal relationship between his work and his injury, under a cumulative detrimental effect theory, particularly in the absence of any contradictory evidence.

- Claimant testified about a specific incident with reference to time and place on August 2, 2004. The incident motivated him to seek medical treatment at the emergency room the same day. He described the same incident to Dr. Bandera at his first visit. As Dr. Bandera opined, the accident on August 2nd alone could have triggered the process of carpal tunnel syndrome. Alternatively, the August 2nd incident could have exacerbated a pre-existing condition, such as tendonitis. A pre-existing disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation benefits if the employment aggravated; accelerated; or, in combination with the infirmity, produced the disability. If the injury serves to produce a further injurious result by precipitating or accelerating a previous, dormant condition, a causal connection can be said to have been established.⁵
- For the employer to suggest that Claimant developed left carpal tunnel syndrome and overuse syndrome with tendinitis of the forearm from previous work as a longshoreman or a skiing accident, which Claimant disavowed, is simply speculative.

⁵*Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

- While Claimant's contemporaneous failure to report the left arm pain as related to work to either Nye or Marks on August 2nd is problematic, this fact alone is not dispositive. The context of Claimant's termination from Winterthur the next day, August 3rd, may help to explain his lack of immediate communication and candor with Employer. Obviously, the relationship between Employer and the Claimant, for reasons having to do with work conduct, was tenuous at best. The fact that Claimant visited the emergency room on August 2nd, and followed up with further medical treatment within a reasonable time period, support Claimant's credibility.
- Relying on Dr. Bandera's unrebutted opinion, the Board concluded that Claimant was disabled from all work as a result of the work injury on August 2, 2004.
- Based on the opinion of Dr. Bandera as to the reasonableness, necessity and relationship to the work injury, Claimant's medical expenses to date, in the amount of \$10,383.99, are compensable. Claimant also is entitled to reasonable attorney's fee.

DISCUSSION

Employer asserts that the Board's decision should be reversed because the Board erred as a matter of law when it awarded benefits to Claimant based on a cumulative detrimental effect analysis. Employer also asserts that the decision of the Board granting Claimant's petition is not supported by substantial evidence.

Regarding legal error, Employer asserts that the Board erroneously relied upon the theory of causation that the cumulative detrimental effect of Claimant's work activities for a week with Employer caused the left upper extremity injuries. Employer claims that this theory of causation should not be applicable to the instant matter because Claimant specifically testified that he had a sudden onset of pain which prompted him to seek medical treatment at the emergency room.

The Board concluded that Claimant had worked for a total of forty-three hours at Winterthur performing repetitive packing activities during the week of his employment. Claimant testified that it was a sudden, onset of pain which prompted him to seek medical treatment, not that the pain was caused by the repetitive nature of his work activities. Further, Employer argues that the

testimony of Dr. Bandera does not support the inference that Claimant's alleged injuries were caused by the repetitive nature of his work. Thus, the Board relied upon a cumulative detrimental effect theory of causation which the record evidence does not support.

Employer asserts that the decision of the Board must be reversed because of lack of substantial evidence. Employer asserts that while the credibility of witnesses is within the purview of the Board, when the determination of credibility is based on inaccurate and mischaracterized evidence, it is for the Court to determine the adequacy of the Board's determination.⁶ Employer argues that Claimant's testimony is inconsistent and conflicting, Claimant testified that he stuffed thousands of envelopes per day, that he taped thousands of boxes and would tie thousands of bows all day long. However, he later testified that he put together 200-300 boxes per day and then placed an envelope in each finished box. Employer's witnesses offered contrary testimony. Nye testified that Claimant would not have stuffed thousands of envelopes and that he would have put together approximately 100 boxes on a given day, and

⁶*Coleman v. Department of Labor*, 288 A.2d 285, 287 (Del. Super. 1972).

Claimant was not required to tie any bows. Marks testified that Claimant would not have stuffed thousands of envelopes per day.

Employer asserts that Claimant testified to several different versions of events regarding the day of the alleged accident. Also, Claimant testified that he did not recall the supervisor's name to whom he reported the incident, while at another time he testified he was certain the name was Jeremy. He told some co-workers that his pain started over the weekend, but did not tell them that it was work-related. Also, on cross examination, Claimant did not recall past medical history and employment history that could have been used by the Board in reaching its conclusion. When Claimant went to the emergency room for treatment, he advised the emergency room personnel that he began having pain in his arm two days prior, but he testified that he simply did not remember on August 2, 2004 whether he had pain for two days prior to his emergency room visit.

Employer asserts that the Board does not adequately address Claimant's credibility in its decision. For example, the Board opined that perhaps the fact that Claimant was terminated from Winterthur the day after the incident may help to explain Claimant's lack of immediate communication and candor.

Employer asserts that Claimant was not aware that he was being terminated the next day. Therefore, the Board's findings are not supported by substantial evidence. Employer asserts that it is illogical that the Board was able to determine that Claimant met his burden of proof when his testimony was riddled with inconsistencies, and was inaccurate. Also, Claimant was not able to recall a significant amount of information. Employer asserts that the failure of the Board to address the inconsistencies of Claimant's testimony is an abuse of discretion that requires this Court to reverse the decision of the Board.

Claimant argues that the Board's decision granting Claimant's petition to determine compensation due was not an abuse of its discretion and is supported by substantial evidence. Claimant asserts that the cumulative detrimental effect of his work activities for over forty hours at Winterthur caused injuries to his left upper extremity. Claimant asserts that the Board specifically noted that there was no contradictory evidence refuting the existence of the causal relationship.

Claimant asserts that the testimony of Dr. Bandera supports Claimant's position that the injuries were caused by the repetitive nature of his work. Dr. Bandera opined that the ordinary stress and strain of Claimant's work as an

assembler and packager was enough to trigger carpal tunnel symptoms, and was the cause of his left carpal tunnel syndrome and overuse syndrome with tendonitis of the forearm.

Claimant argues that the record clearly reflects that when Claimant experienced excruciating pain at work, he had no idea what had caused the pain. At the hospital Claimant indicated that he experienced tingling in his left arm two days before his injuries. The testimony of other employees further substantiates the claim that Claimant had been experiencing symptoms for two days before his injury.

Claimant cites record evidence establishing that Claimant's injury was related to his performance of repetitive task during his week of employment. Dr. Bandera addressed Employer's questions about the immediate onset of pain. For example, Dr. Bandera testified that working for one day for 8 hours could be enough to trigger a process of carpal tunnel. Claimant asserts that Dr. Bandera's testimony was unrebutted as to causation, and the Board correctly relied upon it. The Board did not rely solely on an alternate theory of causation. Rather, the Board indicated that Claimant's injuries satisfied the "but for"

standard illustrated in *Reese*⁷ and alternatively, the cumulative detrimental effect theory. The Board opined that it was relying on Dr. Bandera's opinion that "the incident on August 2 alone could have triggered the process of carpal tunnel syndrome, or the August 2 incident could have exacerbated a pre-existing condition, such as the tendonitis. A pre-existing disease or infirmity . . . does not disqualify a claim for workers' compensation benefits if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." Thus, the Board properly determined that Claimant met his burden of proof relating to causation under not only the cumulative detrimental stress standard, but also, under the standard set forth in *Reese* relating to pre-existing conditions.

Claimant asserts that Claimant's testimony was not "inaccurate, inconsistent, and conflicting," as asserted by Employer. There is substantial evidence to support the Board's conclusion that Claimant was a credible witness. The Board properly determined that any inconsistencies were minor and immaterial. Whether Claimant testified accurately that he stuffed what seems like thousands or hundreds of envelopes on a given day, and that he

⁷*Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

assembled and packed what seemed like hundreds of boxes, does not change the undisputed fact that Claimant's work was repetitive in nature.

Claimant asserts that the Board specifically addressed Employer's argument that Claimant testified to several different versions of events regarding the day of the alleged accident. The Board rejected Employer's credibility arguments as it was entitled to do. It is within the Board's exclusive power to weigh evidence and determine questions of credibility.⁸

Claimant asserts that Claimant's credibility with regard to "whose suggestion it was to obtain medical treatment from the hospital" is in no way relevant to determining whether Claimant's injuries were caused by his work activities. One fact remains undisputed: Claimant's testimony reveals that after experiencing "excruciating" pain, he went to the emergency room.

Claimant asserts that Employer relied on speculation when questioning Claimant about his past medical and employment history. Further, those records and assertions did not provide substantial proof that Claimant previously was injured. Thus, the Board made a thorough evaluation of Claimant's testimony and specifically addressed the concerns raised by Employer regarding

⁸*Giofre v. G.C. Capital Group*, 1995 WL 264585, at *3 (Del. Super.).

credibility. The Board exercised reasonable judgment when it found Claimant to be a credible witness; there was no abuse of discretion.

STANDARD OF REVIEW

In reviewing the decisions of the IAB, this Court must determine whether the findings and conclusions of the Board are free from legal error and supported by substantial evidence in the record.⁹ The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.¹⁰ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.¹¹ The appellate court merely determines if the evidence is legally adequate to support the agency's factual findings.¹² It also determines if the Board made any errors of law.

Also, on appeal "[t]he Superior Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make

⁹*General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. 1985); *Talmo v. New Castle County*, 444 A.2d 298, 299 (Del. Super. 1982), *aff'd*, 454 A.2d 758 (Del. 1982).

¹⁰*General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corporation*, 213 A.2d 64, 66-67 (Del. 1965).

¹¹*Oceanport Ind. V. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986).

¹²Title 29 Del. C. § 10142(d).

its own factual findings and conclusions.”¹³ The Superior Court may not overturn a factual finding of the Industrial Accident Board unless there is “no satisfactory proof” supporting the Board’s finding.¹⁴ It is also well established that “[t]he credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the Board to determine.”¹⁵

ANALYSIS

In light of Dr. Bandera’s un rebutted testimony, the Court concurs with the Board’s assessment that Claimant’s injury was related to his performance of repetitive tasks during his week of employment with Employer. It is undisputed that Claimant experienced excruciating pain on August 2, while working for Employer. Dr. Bandera, who saw Claimant for treatment and reviewed his medical records, opined that Claimant developed left carpal tunnel syndrome and overuse syndrome with tendonitis of the forearm, related to his work as an assembler at Winterthur. Dr. Bandera also concluded that Claimant had been disabled from all work since August 2, 2004, related to the work injury. An

¹³*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

¹⁴*Id* at 67.

¹⁵*Coleman v. Department of Labor*, 288 A.2d 285, 287 (Del. 1972).

EMG on September 22nd, 2004, was consistent with Dr. Bandera's diagnosis.

Even though there are inconsistencies in Claimant's testimony, the Board took them into account in its decision, and concluded that they were immaterial.

For example, whether the number of boxes packed or the number of envelopes stuffed by Claimant were in the hundreds or the thousands, the fact remains that the task was repetitive and, according to Dr. Bandera's testimony, triggered the left upper extremity injuries. Similarly, the undisputed fact that Claimant went to the emergency room after experiencing excruciating pain is important. The identity of the person at whose suggestion Claimant went to the emergency room is immaterial. This reviewing Court declines to overturn the Board's ruling as to Claimant's credibility.¹⁶

Dr. Bandera's un rebutted testimony established causation under the cumulative detrimental stress standard, as well as under the standard set forth in *Reese*.¹⁷ As trier of fact, the Board had discretion to rely on Dr. Bandera's opinion, i.e., that the August 2nd incident alone could have triggered the process

¹⁶*Johnson v. Chrysler Corp.*, 213 A.2d 64, 64 (Del. 1965).

¹⁷*Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

of carpal tunnel syndrome; or that the August 2nd incident could have exacerbated a pre-existing condition, such as tendonitis.

CONCLUSION

Claimant had the burden of establishing by a preponderance of the evidence that he was entitled to compensation for a work injury that occurred on August 2, 2004. Claimant was able to meet this burden to the satisfaction of the Board. The Board did not misapply the law. The Board's decision is not manifestly unreasonable.¹⁸ This Court "will not substitute its judgment for that of an administrative body where there is substantial evidence to support the decision and subordinate findings of the agency."¹⁹ The Board based its opinion upon the testimony of the medical expert, Dr. Bandera, Claimant's medical records, and the testimony presented at the hearing before the Board on June 28, 2005. This Court must take "due account of the experience and specialized competence" of the Board and the purposes of the Workman's Compensation Act.²⁰

¹⁸*Ohrt v. Home*, 1996 WL 527212 (Del. Super).

¹⁹*Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981).

²⁰29 Del. C. § 10142(d).

THEREFORE, the decision of the Industrial Accident Board is hereby
AFFIRMED.

IT IS SO ORDERED.

The Honorable Mary M. Johnston